
IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
Division Three

Civ. No. B 005912
(Super. Ct. No. C420153)

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Plaintiff-Appellant,
and
MARY SUE HUBBARD,
Intervenor-Plaintiff-Appellant,
- against -
GERALD ARMSTRONG,
Defendant-Respondent.

ON APPEAL FROM SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
JUDGE PAUL G. BRECKENRIDGE, JR.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

In his Brief of July 9, 1990, respondent adopts by reference his earlier brief submitted to this Court on January 25, 1986. As a result of the settlement of the injunctive aspects of this case and the return of the converted documents to the Church, portions of respondent's earlier brief are no longer relevant to this case. Specifically, Sections V and VI, pertaining to the defense of unclean hands, and Section VII, pertaining to the trial court's unsealing order, are no longer at issue.

Like respondent, appellants hereby incorporate by reference their prior Reply Brief and Reply Appendix, submitted to this Court on March 25, 1986. However, Sections V, VI and VII of that Reply Brief, which address the issues of unclean hands and the sealing of documents are no longer relevant to this case, and should be disregarded.

ARGUMENT

- I -

THE RECORD ON APPEAL IS ENTIRELY ADEQUATE
FOR THIS COURT TO CONDUCT A THOROUGH REVIEW
OF THE TRIAL COURT'S ADMISSION AND USE OF
EVIDENCE BELOW

In addition to incorporating his prior arguments into his present brief, respondent claims that he is unable to adequately prepare his appeal in the absence of certain trial exhibits which are no longer part of the record. Specifically,

respondent argues that this Court's access to the Church documents which were returned to appellant pursuant to a settlement agreement between the parties^{1/} are indispensable on appeal since, according to respondent, "every argument made by appellants and every response thereto turns on the large body of evidence presented at trial . . . [the] mass of [which] is now exclusively in the hands of appellants and/or their third party representatives." Respondent's Brief, at 4. According to the respondent, the evidence "used by the trial court in forming its Statement of Decision is forever gone . . . only because of the acts of Appellants in making certain that such would be the case." Respondent's Brief, at 11. As a result, respondent urges, appellants should be denied all relief.

In response, it must initially be emphasized that the settlement agreement pursuant to which the documents in question were returned to the appellants was actively negotiated and freely entered into by respondent. Far from being the duped victim of appellants' machinations, as respondent's brief would indicate, respondent benefitted enormously from the agreement's terms.^{2/} Respondent's characterization of the settlement agree-

^{1/} On December 11, 1986, the parties entered into a partial settlement agreement which, among other things, required the return of all documents which had been surrendered to the Court by respondent and his attorneys pursuant to court order, and all documents taken by respondent from the Church of Scientology. See Appellants' Supplemental Appendix in Lieu of Clerk's Transcript (submitted to this Court with Appellants' Brief on December 21, 1989), at 2-5.

^{2/} In particular, the combined effect of a stipulation in the settlement contract and a concurrently executed indemnity agreement between the parties' attorneys effectively limits a poten-
(footnote continued)

ment as a bad-faith plot to deprive respondent of meaningful review is therefore not merely laughable but is irresponsibly distorted as well.

More significantly, this Court's ability to thoroughly review the issues presented in this case is in no way undermined by the current absence of these documents from the record. None of the documentary exhibits below, and in particular, none of the documents which were initially taken by Armstrong from the

(footnote continued from previous page)
tial transfer in damages from Armstrong to the Church to one dollar. See Appellants' Brief at 7-8.

Respondent's suggestion that, as a result of the settlement agreement, this case may now be moot is incorrect. See Appellants' Brief at 61-63. However, even if the case has become moot, the proper procedure is for this Court "to reverse the judgment with directions to the trial court to dismiss the action for having become moot prior to its final determination on appeal." Callie v. Board of Supervisors for the County of Los Angeles, 81 Cal.App.3d 13, 19, 81 Cal.Rptr. 440, 444 (2d Dist. 1969). See also Paul v. Milk Depots, Inc., 396 P.2d 924, 41 Cal.Rptr. 468, 471 (1964); Bell v. Board of Supervisors of San Joaquin County, 55 Cal.App.3d 629, 637, 127 Cal.Rptr. 757, 762 (3d Dist. 1976). Such a procedure is preferable to dismissal when a case becomes moot pending appeal because "the dismissal of an appeal is in effect an affirmance of the judgment or order appealed from." Paul v. Milk Depots, Inc., 41 Cal.Rptr. at 471, quoting Code of Civil Procedure Section 955. As the California Supreme Court has stated, "it is appropriate to avoid thus 'impliedly' affirming a judgment [where the merits of the judgment are not reached]. Since the basis for that judgment has now disappeared, we should 'dispose of the case,' not merely of the appellate proceeding which brought it here." Paul v. Milk Depots, Inc., 41 Cal.Rptr. at 471.

This procedure is particularly required if a case has become moot as a result of a settlement reached pending appeal. In the absence of such a procedure, an appellant who sought to settle a case pending appeal would still bear the risk of unknown collateral consequences from the judgment against him in the lower court. The public policy interests supporting voluntary settlement of cases, even while on appeal, mandates the procedural rule set forth in the above-cited cases.

Church, are necessary for a determination of either of the two issues on appeal.

With respect to the evidentiary issue, there is no dispute between the parties that these document were admitted into evidence for the purpose of showing defendant's state of mind. At issue is whether the court made proper use of these documents, once admitted, and, if not, whether appellants were prejudiced as a result.^{3/} Evidence of the trial court's improper use of the documents is not contained in the documents themselves but in the trial court's opinion.

The language of the trial court's decision, without more, makes absolutely manifest that the documents in question, along with Armstrong's testimony and the testimony of other

^{3/} It is important to point out that respondent's contention that "[t]he major thrust of appellants' argument" concerns the introduction into evidence and the impermissible evidentiary use of the "myriad documents" which are now back in appellants' possession, Respondent's Brief at 6, is simply not true. While appellants do challenge the trial court's improper admission and consideration of documents regarding the Church (most of which, it must be emphasized, were stolen by respondent) for their truth, appellants' brief makes plain that they consider the court's admission of hours upon hours of testimony both by respondent and by persons deeply antagonistic to the Church, and the court's subsequent use of this testimony to pass judgment on the entire religion, to be the most egregious of its evidentiary errors, and the one which provides the core evidentiary issue on appeal. The court record includes a full trial transcript containing a word for word recitation of this testimony and is obviously complete with respect to these evidentiary challenges.

Further, appellants' claims on appeal focus predominantly on the trial court's creation of or reliance upon defenses which, as a matter of law, were inapplicable to the four causes of action in the underlying suit. Indeed, while not in any way seeking to diminish the significance of appellants' evidentiary claims, it is important to point out that appellants' brief devotes far more attention to the issue of improper defenses than to the question of the court's evidentiary errors.

Church antagonists, were considered by the court for their truth. As appellants point out in their opening brief, the trial court issued a wholesale condemnation of the Church, including its founder and its adherents. The decision pronounces negatively upon the ethics and overall worth of the institution, even to the point of making a pseudo-medical diagnosis of the Church and Mr. Hubbard. While these "findings" are supposed to be tied to the question of the subjective state of mind of the defendant upon committing the tortious acts and to the reasonableness of his conduct, the opinion fails to link its characterization of the Church with Armstrong's subjective experience.

The contents of the documents are equally irrelevant with respect to appellants' challenge to the propriety of the justification defenses. At issue is not whether the documents support defendant's claims as to his state of mind at the time he took the Church documents. Instead, in this appeal appellants presume defendant's asserted state of mind, and argue that the justification defenses permitted to Armstrong are not properly available as a matter of law. The issue is briefed as a legal matter by both sides, and neither side makes reference to any documents in their arguments.

Respondent's complaint that since "appellants cite to exhibits no less than thirteen times," the unavailability of the documents places respondent at a "disadvantage" (Respondent's Brief, at 10), is preposterous. First of all, respondent's entire substantive argument is contained in his prior brief in

this case, which he has incorporated by reference. The exhibits were completely "available" to respondent when he wrote that brief. Second, none of the citations to specific documents made in Appellants' brief are among those documents stolen by defendant from the Church. Eleven of the thirteen citations concern the circumstances surrounding defendant's tortious conduct and its aftermath, and are clearly not among those documents whose use appellants challenge.^{4/} Neither of the remaining documents -- one detailing the issuance of a Scientology "declare" (analogous to a writ of excommunication) of Armstrong, and the other concerning the revocation of the "fair game" policy^{5/} by the Church of Scientology in 1969 -- are necessary to a resolution of the purely legal issues presented on this appeal.

^{4/} Exhibits 6, 9, 48 and 54, cited to in Appellants' Brief, at 9, were documents introduced by plaintiffs to attempt to prove that defendant had worked for the Church of Scientology rather than for L. Ron Hubbard during his position as Researcher for the LRH Personal Public Relations Office. Exhibits 35 and 36, cited in Appellants' Brief at 10, contained written Church policy regarding the handling of archival material, and were introduced by plaintiffs to show that defendant knew that documents were never to be removed from archives and how highly the Church valued its archival materials. Exhibits 17, 18, 19, cited in Appellants' Brief at 13 in the Statement of Facts, were three letters documenting correspondence between the Church and defendant, in which the Church demanded the return of all archival materials, and defendant denied that he possessed the materials; and Exhibit 21, cited in Appellants' Brief at 13, was introduced by plaintiffs to demonstrate that the Church incurred substantial monetary loss by having to retain a private investigator's firm to determine which materials defendant had in his possession. Defendant's Exhibit F, cited in Appellants' Brief at 14, was defendant's petition to serve as an archivist for the Church.

^{5/} The policy concerned the non-availability of the Scientology internal justice system to excommunicated members. It was repeatedly mischaracterized as a policy of retribution.

Finally, every admitted document was characterized in testimony on the record before its admission, and the contents of the great majority of the documents were described in significant detail. The complete or near-complete contents of numerous other documents were read verbatim into the record during defendant's testimony. A complete review of Armstrong's testimony at trial reveals a lengthy series of detailed descriptions of those Church documents which were introduced into evidence in support of his justification defenses. Even if the contents of the documents were in any way relevant to this appeal, respondent's claim that this Court lacks a sufficient record to review the trial court's evidentiary use of the documents is clearly without foundation in light of the availability of the transcript.

- II -

**THE TRIAL COURT'S IMPROPER FINDINGS BASED
UPON STATE OF MIND HEARSAY EVIDENCE DEMONSTRATE
WHY APPELLANTS ARE ENTITLED TO A NEW TRIAL.**

Respondent complains that appellants are before this Court because they do not like the dicta in the trial court's opinion. Respondent's Brief, at 9. While appellants vehemently oppose the trial court's characterization of the Church, they focus on the terms of the decision below precisely because those terms reveal the extent to which the trial court failed to confine itself to a proper consideration of the evidence. Although a court's opinion is not the decision, "a judge's opinion may be used as an aid in the interpretation of an uncer-

tain decision or the discovery of the grounds thereof, for the purpose of affirming, modifying or reversing it." 9 Witkin, California Procedure § 264, at 271.

The opinion plainly demonstrates the evidentiary errors engaged in by the trial court and, as a result, the erroneous basis for the decision. Far from limiting its consideration of the documents and testimony to the issue of defendant's state of mind, the court used the evidence to condemn the Church as an institution. Once having lambasted the tort victim inside and out, any tortious behavior against it becomes by definition "justifiable." In effect, the court created a per se justification defense for tortious conduct against the Church.

Because it is, without question, "reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error," People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243 (1956), cert. denied, 355 U.S. 846 (1957), the trial court's evidentiary errors resulted in a "miscarriage of justice," id., and the decision should therefore be reversed.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in appellants' opening brief and their Reply Brief of

March 25, 1986, this Court should reverse the trial court's judgment and order entry of judgment for appellants.

Dated: August 30, 1990

Respectfully submitted,

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